# Affin-ACF Finance Bhd (formerly known as Asia Commercial Finance (M) Bhd) v Phang Ngan Heong (t/a Syarikat Kereta Kwong Yue)

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–209 OF 2003
AMELIA TEE ABDULLAH JC
29 DECEMBER 2009

*Hire Purchase — Breach of agreement — Motorcar seized by police and found to be stolen — Claim by owner against dealer — Claim for indemnity against potential claims by hirer — Implied condition on dealer under s 14(a) of the Sale of Goods Act 1957 that dealer must have right to sell vehicle — Whether breach of condition — Whether claim by hirer time barred — Whether claim for indemnity allowable — Claim for refund of total purchase price from dealer due to total failure of consideration — Claim for term charges against dealer — Whether allowable — Whether owner may claim against dealer*

*Hire Purchase — Hire purchase agreement — Relationship of parties — Two separate transactions — Contract of sale between dealer and owner — Hire purchase contract between owner and hirer — Breach of agreement — Whether owner may claim against dealer*

The plaintiff was a licensed financial institution and the defendant was a car dealer. By way of an agreement between the plaintiff and the defendant, the plaintiff agreed to purchase and the defendant agreed to sell a Honda Accord car registration No WDK 6677 for a total consideration of RM120,200. Chin Yu Shen ('the hirer') was granted a hire purchase loan by the plaintiff to finance the purchase of the car. The loan amount was RM80,000 with term charges of RM32,000. The hirer paid RM40,200 directly to the defendant on account of the plaintiff and the plaintiff then paid the balance RM80,000. The car was then registered in the name of the hirer with ownership being claimed by the plaintiff. Subsequently the car was seized from the hirer by the police on suspicion that it was a stolen vehicle. Investigations confirmed that the chassis of the vehicle had been tampered with and the identity of the car was actually WDR 8478 which had been reported as stolen. The plaintiff therefore commenced this suit claiming against the defendant for an order that the defendant indemnify the plaintiff against all claims made or to be made by the hirer, RM120,200 being the cost of the said car paid by the plaintiff to the defendant and the term charges of

RM32,000. The defendant claimed since he had entered into a contract of sale with the hirer and not the plaintiff there was no legal nexus between him and the plaintiff. The defendant also argued that he had taken all reasonable steps by carrying out the necessary inspection and search with the relevant parties before buying the vehicle from the previous owner. The key issue to be determined by the court was whether the defendant could have and did pass a good and valid title to the plaintiff following the sale of the vehicle.

**Held**, allowing the plaintiff's claim in para (b) with costs and dismissing the claims in paras (a) and (c):

(1) There were two separate transactions. First, the sales transaction involving the sale of the vehicle from the defendant to the plaintiff. The contract of sale was between the defendant as seller and the plaintiff as purchaser. The vehicle was subsequently let or hired out to the hirer under a hire purchase agreement (see paras 26 & 29).

(2) There was an implied condition on the part of the defendant under s 14(a) of the Sale of Goods Act 1957 that he had the right to sell the vehicle. It was irrelevant that following the sale, the car was successfully registered in the name of the hirer by the Road Transport Department. In light of the fact that the car was subsequently seized by the police and was returned to its rightful owner, it followed therefrom that the plaintiff no longer had possession of the vehicle and would not have been able to pass on ownership of WDK 6677 to the hirer at the close of the hire period under the hire purchase contract. The passing of ownership at the time of the sale alone is insufficient. The ownership must continue to remain with the plaintiff for there to be a meaningful passing of ownership. There had been a total failure of consideration as the very identity of the property allegedly sold was questionable (see paras 32 & 41); *Lian Lee Motor Sdn Bhd v Azizuddin bin Khairuddin* [2001] 5 MLJ 334 (referred).

(3) On 10 February 2003 when the action was filed by the plaintiff, the limitation period for the hirer to file a suit against the plaintiff had not yet lapsed. However, the hirer had not filed any action against the plaintiff even as at the date of the hearing in 2009. His claim was now clearly time barred under the Limitation Act 1953 and therefore the plaintiff could not succeed in his claim for an indemnity from the defendant (see para 42).

(4) There was a total failure of consideration in the sales contract between the plaintiff and the defendant. The very identity of the vehicle WDK 6677 sold by the defendant had now been disproved. The vehicle WDK 6677 did not exist since it was in reality another vehicle WDR 8478.

A The plaintiff was entitled to a refund of the total purchase price of the vehicle. It was immaterial that the sum of RM40,200 was paid by the hirer as deposit as that sum constituted part of the total purchase price for the vehicle and was paid by the hirer for and to the account of the plaintiff. It was also immaterial that the hirer had paid installments to the plaintiff and had the use of the car for the period prior to its seizure by the police. That was solely a matter between the plaintiff and the hirer (see para 43).

(5) The plaintiff's claim for RM32,000 in respect of term charges was dismissed. The term charges arose from the hire purchase agreement between the plaintiff and the hirer and to which the defendant was not a party (see para 44).

**[Bahasa Malaysia summary**

Plaintif merupakan institusi kewangan berlesen dan defendan merupakan peniaga kereta. Melalui satu perjanjian antara plaintif dan defendan, plaintif bersetuju membeli dan defendan bersetuju menjual sebuah kereta Honda Accord bernombor pendaftaran WDK 6677 bagi sejumlah RM32,000. Chin Yu Shen ('penyewa') diberikan pinjaman sewa beli oleh plaintif untuk pembiayaan kereta tersebut. Jumlah pinjaman tersebut ialah RM80,000 dengan caj bertempoh RM32,000. Penyewa membayar RM40,200 terus kepada defendan bagi pihak plaintif dan plaintif kemudiannya membayar baki RM80,000. Kereta itu kemudiannya didaftarkan atas nama penyewa tetapi pemilikan boleh dituntut plaintif. Kemudiannya kereta tersebut dirampas polis daripada penyewa kerana disyaki kereta tersebut kereta curi. Daripada penyiasatan, telah disahkan bahawa casis kereta tersebut telah diubah dan identiti kereta tersebut sebenarnya WDR 8478 dilaporkan telah dicuri. Oleh itu plaintif memulakan tindakan ini menuntut terhadap defendan untuk suatu perintah defendan mengganti rugi plaintif kesemua tuntutan yang telah dibuat atau akan dibuat oleh penyewa, RM120,200 sebagai kos kereta tersebut yang telah dibayar oleh plaintif kepada defendan dan caj bertempoh sebanyak RM32,000. Defendan mendakwa bahawa disebabkan dia telah menandatangani satu kontrak jualan dengan penyewa dan bukannya plaintif maka tiada hubungan perundangan antaranya dan plaintif. Defendan juga berhujah bahawa dia telah mengambil kesemua langkah wajar dengan melaksanakan pemeriksaan dan pencarian yang perlu dengan pihak-pihak relevan sebelum membeli kereta tersebut daripada pemilik sebelum ini. Isu pokok yang perlu dipertimbangkan oleh mahkamah adalah sama ada defendan boleh dan telah memberikan pemilikan yang baik dan sah kepada plaintif berikutan penjualan kereta tersebut.

**Diputuskan**, membenarkan tuntutan plaintif di perenggan (b) dengan kos dan menolak tuntutan di perenggan (a) dan (c):

(1) Terdapat dua transaksi yang berasingan. Pertama, transaksi jualan yang

melibatkan jualan kereta tersebut daripada defendan kepada plaintif. Kontrak jualan tersebut adalah antara defendan sebagai penjual dan plaintif sebagai pembeli. Kereta tersebut kemudiannya disewakan kepada penyewa di bawah penjanjian sewaan (lihat perenggan 26 & 29).

(2) Terdapat perjanjian tersirat di pihak defendan di bawah s 14(a) Akta Jualan Barangan 1957 bahawa dia berhak menjual kereta tersebut. Adalah tidak relevan bahawa berikutan penjualan tersebut, kereta tersebut berjaya didaftarkan atas nama penyewa oleh Jabatan Pengangkutan Jalan. Berikutan fakta bahawa kereta tersebut kemudiannya dirampas oleh polis dan dikembalikan kepada pemilik sebenar, jelas bahawa plaintif tidak lagi memiliki kereta tersebut dan tidak boleh memberi milik WDK 6677 kepada penyewa apabila tamat tempoh penyewaan di bawah kontrak sewa beli tersebut. Pemberian milikan pada ketika jualan semata-mata adalah tidak mencukupi. Terdapat kegagalan balasan sepenuhnya disebabkan oleh harta yang dijual adalah diragui (lihat perenggan 32 & 41); *Lian Lee Motor Sdn Bhd v Azizuddin Khairuddin* [2001] 5 MLJ 334 dirujuk.

(3) Pada 10 Februari 2003 apabila tindakan ini difailkan oleh plaintif, tempoh had masa bagi penyewa untuk memfailkan satu tindakan terhadap plaintif belum lagi tamat. Tetapi, penyewa tidak memfailkan apa-apa tindakan terhadap plaintif sehingga tarikh pendengaran dalam tahun 2009. Tuntutannya kini adalah jelas dihalang oleh had masa di bawah Akta Had Masa 1953 dan oleh itu plaintif tidak akan berjaya dalam tuntutannya untuk tanggung rugi daripada defendan (lihat perenggan 42).

(4) Terdapat kegagalan balasan sepenuhnya dalam kontrak jualan antara plaintif dan defendan. Identiti kereta WDK 6677 yang telah dijual oleh defendan kini terbukti sebaliknya. Kereta WDK 6677 tidak wujud kerana realitinya kereta tersebut merupakan WDR 8478. Plaintif berhak kepada pemulangan keseluruhan harga belian kereta tersebut. Ia tidak penting bahawa sejumlah RM40,200 telah dibayar oleh penyewa sebagai deposit kerana jumlah tersebut termasuk dalam jumlah keseluruhan harga belian kereta tersebut dan telah dibayar oleh penyewa untuk dan bagi pihak plaintif. Juga tidak material bahawa penyewa tersebut telah membayar bayaran ansuran kepada plaintif dan telah menggunakan kereta tersebut bagi suatu tempoh sebelum kereta tersebut dirampas polis. Itu merupakan hal antara plaintif dan penyewa sahaja (lihat perenggan 43).

(5) Tuntutan plaintif untuk RM32,000 bagi caj bertempoh ditolak. Caj bertempoh tersebut berbangkit daripada penjanjian sewa beli antara plaintif dan penyewa yang mana defendan bukanlah pihak dalam perjanjian tersebut (lihat perenggan 55).]

**Notes**

For cases on breach of agreement in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3817–3856.

For cases on hire purchase agreement in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3867–3912

**Cases referred to**

*Ahmad Ismail v Malaya Motor Co & Anor* [1973] 2 MLJ 66, FC (distd)

*BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] 7 CLJ 377, HC (not folld)

*Chan Hoon Piaw & Anor v Cempaka Finance Bhd* [2003] 1 CLJ 762, HC (refd)

*Lian Lee Motor Sdn Bhd v Azizuddin bin Khairuddin* [2001] 5 MLJ 334; [2001] 1 CLJ 768, HC (refd)

*MBf Finance Bhd v Low Ping Ming t/a Low Ping Enterprise* [2005] 3 MLJ 208; [2005] 1 CLJ 305, CA (refd)

**Legislation referred to**

Hire Purchase Act 1967 s 6(1)(b)
Limitation Act 1953
Sale of Goods Act 1957 s 14(a)

*JK Lim (SP Lai with him) (Soo Thien Ming & Nashrah) for the plaintiff.*
*Rudeen Chua (Rajendran & Deen) for the defendant.*

**Amelia Tee Abdullah JC:**

**[1]** The plaintiff, Affin-ACF Finance Bhd, is a licensed financial institution formerly known as Asia Commercial Finance (M) Bhd. The defendant, Phang Ngan Heong, is a sole proprietor carrying on business under the name and style of Syarikat Kereta Kwong Yeu.

**[2]** The plaintiff's claim against the defendant is for:

(a) An order that the defendant indemnify the plaintiff against all claims made or to be made by Chin Yu Shen, the hirer, arising out of the hire purchase agreement No 027–10–06586–2 in respect of a Honda Accord car registration No WDK 6677;

(b) RM120,200 being the cost of the said vehicle paid by the plaintiff to the defendant;

(c) RM32,000 as term charges; and

(d) Interests and costs.

**[3]** The plaintiff's claim is disputed by the defendant who states that he had entered into a contract of sale with Chin Yu Shen and not the plaintiff. As such, he contends that there is no legal nexus between him and the plaintiff in respect of the said car. Further, the defendant pleads that he is a bona fide purchaser of the vehicle from Chin Ken Koon and had conducted a physical examination including verification of the engine and chassis numbers before its purchase. He claimed to have valid possession and ownership of the vehicle to effect a transfer from the previous owner to Chin Yu Shen.

THE PLAINTIFF'S CASE

**[4]** The plaintiff called two witnesses in support of its case. Ng Suit Huei (PW1) was the senior executive in the Credit & Marketing Department of Affin Bank Bhd ('the bank'). The plaintiff was formerly known as Asia Commercial Finance (M) Bhd. On 13 March 2001, it changed its name to Affin-ACF Finance Bhd. Vide a vesting order dated 26 May 2005, the whole business of Affin-ACF Finance Bhd was transferred to and vested in Affin Bank Bhd with effect from 1 June 2005.

**[5]** PW1 was previously with the credit processing department of the bank and his duties then included the processing of hire purchase loan applications, checking and verification of documents submitted for loan applications, conducting credit checks and physical inspection of second hand vehicles.

**[6]** PW1 testified that by way of an agreement dated 5 November 1997 between the plaintiff and the defendant, the plaintiff agreed to purchase and the defendant agreed to sell a Honda Accord car registration No WDK 6677 for a total consideration of RM120,200. This figure comprises a purchase price of RM118,000, a transfer fee of RM150 and insurance premium of RM2050. He disagreed with the suggestion that the purchase price was only RM118,000.

**[7]** Chin Yu Shen, the hirer, had applied for, and was approved, a hire purchase loan from the plaintiff to finance the purchase of the car. The loan amount was RM80,000 with term charges of RM32,000 repayable by 60 monthly installments of RM1,867 per month commencing on 12 December 1997 and a final installment of RM1,847.

**[8]** PW1 disputed the defendant's contention that the contract of sale of the vehicle was between the defendant and Chin Yu Shen, the hirer. He testified that the contract was between the plaintiff and the defendant as

A evidenced by the sales invoice. He argues that the defendant was aware about the hire purchase agreement between the plaintiff and Chin Yu Shen where it was stated in the second schedule that the plaintiff agreed to be a party 'as owner'. Further it was confirmed at item 5 of Schedule A that the dealer/seller of the car was the defendant. The hirer paid RM40,200 directly to the B defendant *on account of the bank* and the plaintiff then issued a cheque for RM80,000 for the balance. The plaintiff also paid the defendant a commission of RM640. Ownership of the vehicle was then transferred to the plaintiff. It is noted that although the car was registered in the name of Chin Yu Shen, ownership was claimed by the plaintiff.

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**[9]** PW1 testified that on or about 30 August 1999, the car was seized from the hirer by the police from *Ibu Pejabat Polis Kontinjen* Kuala Lumpur on suspicion that it was a stolen vehicle. Subsequently, vide a letter dated 10 November 1999 (PI), the police informed the hirer that their investigations D had been completed. According to a report from the chemistry department, it was confirmed that the chassis of the vehicle had been tampered with and the identity of the car was actually WDR 8478 which had been reported as stolen.

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**[10]** What followed next was that Capital Insurance Bhd provided supporting documents to claim the vehicle (actual registration No WDR 8478) and the car was to be delivered to its agent, Lam Koong Sum. The car was eventually collected by Cheah Bin Sin who was duly authorised by Lam Koong Sum to do so.

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**[11]** Vide a letter dated 14 March 2000 (P3), the plaintiff informed the defendant that the vehicle had been detained by the police and that the findings of the chemistry department was that the chassis number had been G tampered with. The defendant was further informed that police investigations revealed that the vehicle had been reported stolen. The bank informed the defendant that he was liable and requested him to provide a proposal for settlement. No response was received from the defendant. A letter from the plaintiff's solicitors demanding a full refund of the purchase price of the H vehicle by reason of the total failure of consideration also evoked no response. Hence the present suit.

**[12]** PW1 told the court that when the plaintiff purchased the vehicle from the defendant to hire to the hirer, it had expected to acquire 'a legitimate and I genuine vehicle free from encumbrances'. The defendant as seller should have a good title to sell the vehicle.

**[13]** The plaintiff disputes the defendant's contention that they were negligent in not ascertaining the actual ownership of the vehicle before

purchasing it. He confirms that normally the plaintiff was much more cautious about engine and chassis numbers when dealing with used cars. In this case, all the standard procedures of vetting and processing hire purchase loans had been exercised by the plaintiff. All reasonable precautions had been taken to ensure that the vehicle was genuine and legitimate. A physical inspection was conducted on 6 November 1997 to verify that the engine and chassis numbers tallied with the registration card and valuation report to ensure that the vehicle could be registered in the name of the hirer. The loan was released only after the transfer was effected by the Road Transport Department on 8 November 1997.

**[14]** In cross-examination, PW1 agreed that since the registration was successful, *at that time* good title to vehicle WDK 6677 had passed to the hirer. He agreed that the sale of the car was concluded when the full purchase price was made and the car was transferred to the hirer. He further agreed that the hirer had not taken any action against the plaintiff for not passing him a good title. Neither had he sued for the return of his money.

**[15]** Sgt Mohd Yusof bin Abu Bakar (PW2) was the police officer involved in the arrest of a male Chinese named Lee Ming Hart and the seizure of a Honda Accord WDK 6677 on 30 August 1999. After the arrest, he was directed by ASP Ng Siew Yang to send the car to the chemistry department in Petaling Jaya. The chemistry report dated 10 September 1999 (P5) issued by the chemist Lim Kieng Chwee states that the engine as well as the chassis numbers of the vehicle had been tampered with. The original chassis number, after the removal of the paint on the number, was CD4-702055 and the original engine number was MA422202074.

THE DEFENDANT'S CASE

**[16]** The defendant, Phang Ngan Heong (DW1), is the sole proprietor of Syarikat Kereta Kwong Yue. He commenced his business on 1 May 1980 and thus his second hand car business would have been operating for some 29 years.

**[17]** According to the defendant, he bought the vehicle, a Honda Accord registration No WDK 6677 from one Chin Ken Koon. The court notes that no documents or information was available from the defendant as to the date of the purchase or the amount that he paid for it. He testified that he had verified the engine and chassis numbers through physical inspection to ensure that they were consistent with the registration card. In addition, he made a search at the Road Transport Department to confirm that it was an original registration card for a valid and genuine vehicle. He testified that the

information in the registration card of the said vehicle was consistent with the physical details of the car and confirmed by the Road Transport Department to be true and genuine.

**[18]** The defendant testified that he had sold the vehicle to an individual named Chin Yu Shen at a price of RM120,200 inclusive of insurance premium and transfer fee. He identified the sales invoice dated 5 November 1997 (p 8 of NAB1) as that issued by him in relation to the sale. The purchaser paid a down payment of RM40,200 and applied for financing from the plaintiff. The defendant received the balance of the purchase price from the plaintiff vide MBB cheque No 332815 on 12 November 1997 and the vehicle was successfully transferred to Chin Yu Shen on 8 November 1997 as reflected in the registration card.

**[19]** The defendant claimed that he had no knowledge about the seizure of the car by the police. He did not receive any claim from any party in relation to the car and insisted that he did not receive any letter of demand from the plaintiff's solicitors. He had no knowledge of the police report lodged in respect of the loss of vehicle WDR 8478 or the registration particulars of that vehicle.

**[20]** The defendant disputed any involvement with the hire purchase agreement which was strictly between the plaintiff and the hirer and he denied any responsibility to the plaintiff in this regard. In any event, he argued that he had taken all reasonable steps by carrying out the necessary inspection and search with the relevant parties before buying the vehicle from the previous owner. He argues that Chin Yu Shen had enjoyed quiet and peaceful possession of the vehicle as ownership was successfully transferred to him. This would show that the Road Transport Department had conducted the necessary investigations and had found that the vehicle could be so registered.

**[21]** The defendant complained that the action filed against him was unreasonable and without basis as he was not responsible for tampering with the engine and chassis numbers of the vehicle, if indeed they were tampered with. He alleged that the plaintiff was itself negligent when it failed to take the necessary action to ascertain that the vehicle was genuine.

**[22]** The defendant pointed out that he had never received RM120,200 from the plaintiff. He had received RM40,200 from Chin Yu Shen and the balance of RM80,000 from the plaintiff through hire purchase facilities. In any event, no claim has been made by Chin Yu Shen over the loss of his rights to the vehicle. However, during cross-examination, he agreed that the sales invoice at p 8 of NAB2 confirms that he had received a sum of RM120,200

as the purchase price of the car. He agreed that the RM40,200 was paid to him by the hirer on behalf of the plaintiff. He further agreed that he had sold the car to the plaintiff and had introduced Chin Yu Shen to the plaintiff for the purpose of obtaining a hire purchase loan.

**[23]** Despite being shown P1, the letter from the police informing that the report from the chemistry department confirmed that the chassis of the vehicle had been tampered with and that the identity of the car was actually WDR 8478 which had been reported as stolen, the defendant disputed that the engine and chassis numbers of WDK 6677 had been tampered with and offered the weak and illogical protest that 'he did not know'.

EVALUATION AND FINDINGS

**[24]** In coming to a decision in this case, I have carefully considered the evidence adduced by both parties as well as the submissions and authorities tendered in support of their respective cases.

**[25]** In cases of this nature which involves an individual who wishes to purchase a car from a dealer but requires financing to be able to do so, there would necessarily be three parties in the equation. In this case, Chin Yu Shen was desirous of buying Honda Accord WDK 6677 from the defendant, a second hand car dealer carrying on business under the name and style of Syarikat Kereta Kwong Yue. Chin Yu Shen required financing and was introduced to the plaintiff for his financing needs. There was evidence that the plaintiff subsequently paid RM640 to the defendant as commission for the introduction.

**[26]** The court agrees that there would be two separate transactions in this case. First, there is the sales transaction involving the sale of the vehicle WDK 6677 from the defendant to the plaintiff. The court has considered para 3.4 of the amended statement of defence where the defendant pleads that it had sold the said car to Chin Yu Shen and that its sales contract is with Chin Yu Shen and not the plaintiff. It is clear that the defendant's contention is not supported by case law.

**[27]** In the case of *MBf Finance Bhd v Low Ping Ming t/a Low Ping Enterprise* [2005] 3 MLJ 208; [2005] 1 CLJ 305, the respondent company had purchased a vehicle from Avian Engineering Malaysia Sdn Bhd ('Avian'). It paid a deposit of RM35,000 but had to take a loan from the appellant under hire purchase for the balance of RM160,000. The vehicle was registered in the name of the respondent but with an ownership claim by the appellant in the registration card. Subsequently, the respondent defaulted in payments and the vehicle was repossessed. The court held, inter alia, that the

endorsement of ownership claim on the registration card of the vehicle meant that the respondent could not deal with the vehicle without the consent of the appellant as it did not have a claim or title to the vehicle. That made the appellant the owner of the vehicle and his claim would prevail over that of the respondent even though the latter was registered as the owner.

**[28]** Similarly in the case of *Chan Hoon Piaw & Anor v Cempaka Finance Bhd* [2003] 1 CLJ 762, the High Court held that the down payment by the first defendant to the motorcar dealer did not vest the first defendant with the ownership of the motorcar. The down payment was only a deposit towards the hire purchase and even the fact that it was paid to the car dealer prior to the execution of the hire purchase agreement did not render the agreement void.

**[29]** I am satisfied that in this case the contract of sale is between the defendant as seller and the plaintiff as purchaser. The vehicle was subsequently let or hired out to Chin Yu Shen under a hire purchase agreement. A close look at Schedule A of the said agreement would reveal that Chin Yu Shen was described as 'hirer', the defendant as 'the dealer/seller' whilst the plaintiff with its address at 22, Jalan 3/32, 6th Mile Off Jalan Kepong was described as the 'owner'.

**[30]** Notwithstanding the defendant's perverse insistence that there was no evidence that vehicle WDK 6677 was a stolen car with tampered engine and chassis numbers, the court finds that the plaintiff has satisfactorily established that the vehicle that was bought from the defendant was later seized from the hirer by the police. The court is also satisfied from the evidence of PW2 supported by exh P1 that the chemistry department had ascertained that vehicle WDK 6677 was in reality WDR 8478 whose chassis number had been altered. Apart from a bare denial, the defendant has adduced no evidence whatsoever to disprove this finding.

**[31]** As such, the key issue to be determined by the court is whether the defendant could have and did pass a good and valid title to the plaintiff following the sale of the vehicle. The defendant has argued that it did pass a good title *at that time* as the vehicle was successfully registered in the name of the hirer by the Road Transport Department. With regret, the court does not find that the registration of the vehicle in the name of the hirer amounts to passing on a good and valid title. To discharge that responsibility, the plaintiff should have continued to have a good and valid title so that at the end of the hire purchase period, when the hirer has completed paying all the installments under the hire purchase agreement, the plaintiff would be able, in turn, to pass a good and valid title to the hirer. The seizure of the vehicle by the police and its subsequent return to the rightful owner meant that the

plaintiff no longer had physical possession of the vehicle and would be in no position to pass on any title to the hirer.

**[32]** The plaintiff has referred the court to the case of *Lian Lee Motor Sdn Bhd v Azizuddin bin Khairuddin* [2001] 5 MLJ 334; [2001] 1 CLJ 768 where the car bought by the plaintiff was subsequently seized by the police for being a stolen vehicle. The plaintiff sued for the return of the purchase price. The defendant resisted the claim on the grounds that he was a bona fide purchaser of the car with no knowledge of any defects relating to ownership. It was held by KC Vohrah J that there was an implied condition on the part of the defendant under s 14(a) of the Sale of Goods Act 1957 that he had the right to sell the car. Since the defendant did not have the right to possession of the car, he could not consequently give it to the plaintiff. The court held that the plaintiff had the right to sue for the price paid as money had and received on a total failure of consideration.

**[33]** The defendant has in turn drawn the court's attention to the case of *Ahmad Ismail v Malaya Motor Co & Anor* [1973] 2 MLJ 66 as an authority for the proposition that the sales agreement between the plaintiff and the defendant has been superseded by the hire purchase agreement and therefore the plaintiff has no claim against the defendant. However, upon a careful reading, the Federal Court decision in *Ahmad Ismail* can clearly be distinguished.

**[34]** In the case of *Ahmad Ismail*, the appellant had decided to purchase a second hand Morris bearing registration No BW 343 from the first respondent, a car dealer, for $4,900. He traded in his own car for which he was given a credit of $1,200. He also paid the first respondent $1,000 in cash. He was to pay up the balance before a certain date or else his deposit of $1,000 would be forfeited. As the appellant was still short of $2,700, he entered into a hire purchase agreement with the second respondent, a finance company. Under the agreement, the appellant was to pay the second respondent monthly installments of $150 each. He paid four installments but stopped paying when his car was detained by the police *on suspicion that it was a stolen vehicle*.

**[35]** During the course of police investigations, the police had offered to return the car to the appellant subject to conditions. This was refused by the appellant who, through his solicitors, then terminated the hire purchase agreement by letter. The appellant sued both respondents for damages for breach of contract alleging breach of s 6(1)(b) of the Hire Purchase Act 1967.

**[36]** The appellant's case against both respondents was dismissed by the learned president of the sessions court. His appeal to the High Court was also

dismissed. On further appeal, the Federal Court held, inter alia, that:

> The first ground of appeal concerns only the first defendant. It is said that the learned appellate judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire purchase agreement there still remained a contractual relationship between the two of them and that the learned appellate judge should have held that the first defendant had only assigned his rights in the car to the finance company.
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> We regret we cannot accept this argument. It is true that by exhs P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately those documents were superseded by the hire purchase agreement exh P3 and from the language of this document it is plain that the car dealer faded out of the picture and the only contract that remained then was between the plaintiff and the finance company, and accordingly the plaintiff has no claim against the car dealer.

**[37]** In *Ahmad Ismail*'s case, the claim for damages was made by the appellant who was the hirer in the hire purchase transaction. The Federal Court held that the appellant's case was superseded by the hire purchase agreement. In our instant case, the action was filed by the owner/financer who had purchased it from the dealer. Although there was a subsequent hire purchase transaction between the owner and the hirer, ownership of the vehicle had yet to pass to the hirer. The relationship between the plaintiff and the defendant remains as buyer and seller. There was no superseding by the hire purchase agreement.

**[38]** In *Ahmad Ismail*'s case, the appellant failed in his action against the second respondent, the owner, when the Federal Court held that there was no anticipatory breach of contract as there was no act by the second respondent which made it obvious that it had renounced its liabilities under the contract or that it had become impossible for him to perform. In that case, there was no proof that the car had been stolen and in fact the car was subsequently returned to the second respondent without conditions. In our instant case, the vehicle was confirmed by the police to be a stolen vehicle and subsequently returned to its rightful owners.

**[39]** The defendant has also relied on the case of *BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] 7 CLJ 377 in support of his contention that the doctrine of caveat emptor would apply in this case. He contends that PW1 had admitted that sufficient inspection had been carried out before the

loan was disbursed and this includes checks as to the engine and chassis numbers. On the defendant's part, he states that he too had also done all the requisite checks and on that basis he cannot now be faulted.

**[40]** In perusing the decision of *BBMB Kewangan Bhd*, we must not lose sight of the fact that in that case, the appellant/finance company had sued both the hirer as well as the dealer for the balance unpaid under the hire purchase agreement. The first respondent/hirer had counterclaimed for breach of conditions and warranties arising out of the hire purchase agreement. In finding against the appellant in respect of its claim against the second respondent/dealer, the High Court had agreed with the magistrate that the transaction between the appellant and the second respondent was one of a sale of goods transaction, that is, an outright sale of the vehicle from the second respondent to the appellant. He held that:

> The characteristic of the said sale is that an offer has been made by the second respondent to the appellant; the appellant had done some inspection and investigation on the status and condition of the said vehicle; the appellant agreed to accept the offer for sale and made the necessary payment to the second respondent. The property or ownership title of the said vehicle passed at the time when the sale price was fully paid, just before the appellant entered into the hire purchase agreement with the first respondent in respect of the same subject matter. The doctrine of 'caveat emptor' (let the buyer beware) is applicable against the appellant.

**[41]** The court has carefully perused the above authority but regret that it is unable to agree with it. The court finds that since vehicle WDK 6677 was in reality WDR 8478, the defendant in this case would not be able or capable of passing on ownership or title of WDK 6677 to the plaintiff. The court is in favour of following the decision in the case of *Lian Lee Motor* where the High Court rejected the defendant's defence of bona fide purchaser without knowledge of any defects as to ownership. The court agrees with the decision of KC Vohrah J that there is an implied condition on the part of the defendant under s 14(a) of the Sale of Goods Act 1957 that he had the right to sell the vehicle. The court finds that it is irrelevant that that following the sale, the car was successfully registered in the name of the hirer by the Road Transport Department. In light of the fact that the car was subsequently seized by the police and has now been returned to its rightful owner, it follows there from that the plaintiff no longer has possession of the vehicle and would not have been able to pass on ownership of WDK 6677 to the hirer at the close of the hire period under the hire purchase contract. The court finds that the passing of ownership at the time of the sale alone is insufficient. The

ownership must continue to remain with the plaintiff for there to be a meaningful passing of ownership. In this case, the court finds that there has been a total failure of consideration as the very identity of the property allegedly sold is questionable.

CONCLUSION

**[42]** The plaintiff has prayed for an order of indemnity from the defendant in respect of all and any claims made or to be made by Chin Yu Shen arising from the hire purchase agreement dated 12 November 1997. The court notes that on 10 February 2003 when the action was filed by the plaintiff, the limitation period for the said Chin Yu Shen to file a suit against the plaintiff had not yet lapsed. However, it is now confirmed by the plaintiff that Chin Yu Shen had not filed any action against the plaintiff even as at the date of the hearing in 2009. His claim is now clearly time barred under the Limitation Act 1953. The court agrees with learned counsel for the defendant that since Chin Yu Shen is now time barred from making any claim against the plaintiff, the plaintiff cannot succeed in his claim for an indemnity from the defendant. Accordingly, the plaintiff's claim for indemnity from the defendant under para (a) is dismissed.

**[43]** The court has found that there was a total failure of consideration in the sales contract between the plaintiff and the defendant. The very identity of the vehicle WDK 6677 sold by the defendant has now been disproved. The vehicle WDK 6677 does not exist since it is in reality another vehicle WDR 8478. Based on the evidence and cited authorities, the court finds that the plaintiff is entitled to a refund of the total purchase price of the vehicle. It is immaterial that the sum of RM40,200 was paid by the hirer as deposit as that sum constitutes part of the total purchase price for the vehicle and was paid by the hirer for and to the account of the plaintiff. It is also immaterial that the hirer had paid installments to the plaintiff and had the use of the car for the period prior to its seizure by the police. That is solely a matter between the plaintiff and Chin Yu Shen.

**[44]** Accordingly, the court allows the plaintiff's claim under para (b) and hereby orders the defendant to pay a sum of RM120,200 to the plaintiff with interest at 8% from the date of judgment until full satisfaction and costs. The plaintiff's claim for RM32,000 in respect of term charges is dismissed. The

term charges arose from the hire purchase agreement between the plaintiff and Chin Yu Shen and to which the defendant was not a party.

*Plaintiff's claim in para (b) allowed with costs and claims in paras (a) and (c) dismissed.*

Reported by Kanesh Sundrum